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JOHN F. DAVIS, CLE

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 1182

MORTON K. OHLSON, et al.,
Appellants,

vs.

KENNETH PHILLIPS, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

PETITION FOR REHEARING

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The appellants respectfully move this Court for an order (1) vacating its opinion and order entered March 23, 1970, granting the motion to affirm and affirming the judgment below, and (2) noting probable jurisdiction. As Grounds for this motion, appellants state the following:

On January 23, 1970, *Connell* v. *Higginbotham*, No. 1113, October Term, 1969, was docketed in this Court by the filing of the Jurisdictional Statement, and on March 5, 1970, *Adams* v. *Florida Bd. of Regents*, No. 1281, October Term, 1969, was similarly docketed. Both of those cases are appeals now pending before this Court in which issues, similar to the issues in the present case, are presented for review.

While the instant appeal involves the constitutionality of the teachers' oath requirement prescribed by the Colorado statute, 1963 Colo. Rev. Stats. 123-17-6, 123-17-7, and 123-17-8, as amended, much the same considerations will be before this Court should it consider the attack by the appellants in *Connell* and *Adams* upon the constitutionality of the Florida loyalty oath statute, Fla. Stats. Ann. §§ 876.05-876.10.

The oath provided for by the Florida statute has clauses of both the "negative" or disclaimer type and the "positive" variety. In the "positive" clause of the Florida oath the oath-taker is required to swear that he ". . . will support the Constitution of the United States and of the State of Florida". The Middle District of Florida District Court held unconstitutional the clauses of the oath in which the oath-taker was required to disclaim membership in parties and organizations but found severable and constitutional the "positive" portion of the oath. The constitutional attack by the *Connell* and *Adams* appellants upon the "positive" clause of the Florida oath will involve consideration by the Court of several of the points raised by the appellants in the present case in their Jurisdictional Statement because the Colorado oath in issue is substantially similar to the "positive" portion of the Florida oath.

In the event that this Court should agree with the contention of the *Connell* and *Adams* appellants that the

"positive" clause of the Florida oath violates the First and Fourteenth Amendments' protection of freedom of expression, belief, and privacy, and that that clause also violates the Fourteenth Amendment because of its vagueness and its failure to provide for ascertaining the meaning of the language of the clause and the failure to provide for hearing or procedural safeguards (see *Connell* v. *Higginbotham, supra, Jurisdictional Statement*, pp. 16-18, 20), to leave the substantially similar Colorado oath standing and effective would be anomalous and would impose a burden on the appellants and their fellow teachers in Colorado not shared by persons similarly situated in other states. Such a result should be avoided.

The identity of the issues and similarity of the oath in the present case with the "positive" clause of the Florida oath and the issues relating to that clause presented by the *Connell* and *Adams* cases is a substantial reason for reconsideration of the *per curiam* opinion in the present case affirming the judgment of the District Court below. Because the issues involved are of substantial importance to the public as well as to the teachers of Colorado, the opinion affirming the judgment below should be reconsidered and a rehearing granted so that this case can be heard and decided with the *Connell* and *Adams* cases.

CONCLUSION

For the foregoing reasons, as well as for the reasons set forth in the Jurisdictional Statement of the appellants, appellants pray that this Court grant rehearing of the opinion and order granting the motion to affirm, vacate that opinion and order, and exercise plenary review of this appeal.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

As counsel for the appellants, I hereby certify that this petition for rehearing is presented in good faith and not for delay.

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Counsel for Petitioner